179 (3)

No. 10-537

IN THE

Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether, notwithstanding compelling statutory text reflecting congressional intent to disestablish an Indian reservation, supported by undisputed evidence of (1) circumstances surrounding the dispositive act, (2) subsequent events immediately following the act's passage, and (3) longstanding unchallenged recognition of State jurisdiction, the decisions of this Court or any Circuit require a decision that the reservation remains intact solely because the act does not meet a newly-proposed "plain statement" standard, requiring express disestablishment language.

II. Whether, in addressing evidence of "events that occurred after passage" of an act under the analysis prescribed in *Solem v. Bartlett*, 465 U.S. 463 (1984), for determining whether a reservation was disestablished, a decision holding a reservation disestablished based on statutory language, undisputed evidence of contemporaneous understandings, and events immediately following the dispositive act, and longstanding recognition of State jurisdiction conflicts with the decisions of this Court or any Circuit solely because it did not accord dispositive weight to recent administrative references to a "reservation."

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INTRODUCTION

More than 70 years ago, this Court held the State of Oklahoma may tax the income of an Osage Nation member derived within Osage County. *See Leahy v. State Treasurer of Okla.*, 297 U.S. 420, 421 (1936). Since *Leahy*, this Court has repeatedly reaffirmed Oklahoma's taxation of Osage members in Osage County.[1] Now, nearly a century after passage of the Osage Division Act[2] ("Division Act"), the Osage Nation challenges the same tax this Court upheld in *Leahy*, asserting all of Osage County, Oklahoma, remains a reservation. The Court of Appeals' well-reasoned opinion ("Opinion") correctly rejected the Nation's effort, holding that the Division Act, complemented by the contemporaneous Oklahoma Enabling Act[3] ("Enabling Act"), reflected Congress' intent to strip the Osage Tribe of tribal properties, transmute the Osage Reservation into Osage County, Oklahoma, and thereby disestablish the Reservation. In this case, addressing only privately owned fee lands, and not the few remaining trust or restricted lands, the courts below correctly declined to overturn more than a century of reliance on the understanding that the Reservation had been disestablished and reaffirmed Oklahoma's ability to tax income of Osage members who neither work nor reside on trust or restricted lands in Osage County.

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[1] *United States v. Mason*, 412 U.S. 391, 397 (1973) (Oklahoma estate tax); *West v. Okla. Tax Comm'n*, 334 U.S. 717, 726 (1948) (same); *Chouteau v. Burnet*, 283 U.S. 691, 695-96 (1931) (federal income tax).

[2] Ch. 3572, 34 Stat. 539 (1906) ("An Act For the division of the lands and funds of the Osage Indians in Oklahoma Territory and for other purposes.").

[3] Ch. 3335, 34 Stat. 267 (1906).

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This case was decided on the Alternative Motion for Summary Judgment of the Respondents, Constance Irby, Thomas E. Kemp, and Jerry Johnson,[4] Commissioners of the Oklahoma Tax Commission ("Commissioners"), supported by affidavits of a prominent historian, a demographer, and an expert on pertinent land records. In response, Petitioner submitted no contradictory affidavits and did not object to the Commissioners' evidence. Later, Petitioner filed an untimely motion to strike portions of the Commissioners' evidence, which the district court denied in material part. Petitioner did not appeal that decision. C.A. Supp. App. 65.[5] Consequently, the undisputed record before the Court of Appeals established that the evidentiary factors this Court requires be considered, *see Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984), point unequivocally to disestablishment.

The district court, recognizing the case concerned only taxation arising from fee lands, Pet. App. 33a, analyzed extensively the text of the Division Act, which "retained certain small tracts for tribal use and occupancy," but "transferred nearly all

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[4] The caption of the Opinion below and of the Petition incorrectly identify Respondent Jerry Johnson as "Warden" and as "Vice-Chairman" of the Commission. The title, "Warden," is incorrect.

[5] This brief cites to the record before the Tenth Circuit as follows: "C.A. App." (Appendix for Appellant); "C.A. Add." (Addendum for Opening Brief of Appellant); and "C.A. Supp. App." (Appellees' Supplemental Appendix); C.A. Supp. Add. (Appellees' Supplemental Appendix). Citations to the Appendix attached to the Petition are "Pet.App."

tribal lands to its members." *Id.* at 36a. Most allotted lands were "surplus lands," and, upon issuance of a certificate of competency, the allottee could "sell and convey" the surplus lands, which would "become subject to taxation." *Id.* at 38a. "While the minerals underlying the former tribal lands were reserved to the Nation, all royalties [were to be] distributed to the individual members." *Id.* at 39a. "Although the Act contemplated a continuing tribal government, it left few powers to exercise." *Id.* at 40a. And the Enabling Act "earlier in the same month had subjected the Osage lands to Oklahoma law and Oklahoma courts." *Id.* Consequently, the Division Act "and surrounding circumstances establish Congress' plain intent to terminate the Nation's reservation."[6] *Id.* at 37a.

The Court of Appeals affirmed. Pet. App. 3a-23a. Unlike the district court, which found an unambiguous intent to disestablish, and, contrary to Petitioner's claim that the Court of Appeals found the Act "silent and unambiguous," Pet. 8, the Court of Appeals plainly found the Act ambiguous, Pet. App. 14a. Consequently, the Court of Appeals reviewed uncontroverted evidence of "circumstances surrounding passage of the Act," *id.*, concluding that "legislative history and the negotiation process make clear that all the parties at the table understood the

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[6] The district court concluded the Nation's long delay in asserting its reservation status claim and the State's and nonmembers' substantial reliance on the understanding that the County was not a reservation established that the equitable defense recognized in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005), barred the Osage claim. Pet. App. 56a. The Tenth Circuit, having affirmed on disestablishment grounds, declined to reach the equitable ruling. Pet. App. 23a.

Osage reservation would be disestablished." *Id.* at 17a. It also reviewed the uncontroverted record of events occurring immediately after 1906 and found that "federal officials responsible for the Osage lands repeatedly referred to the area as a 'former reservation' under state jurisdiction," *id.* at 20a, that "uncontested population demographics demonstrate a dramatic shift . . . immediately following the passage of the [Act]," *id.* at 21a, and that "[l]and ownership also dramatically shifted from tribal members to nonmembers through certificates of competency." *Id.* at 22a. Rejecting Petitioner's reliance on recent federal actions, *id.* at 19a, the Court of Appeals held "the Osage reservation has been disestablished by Congress." *Id.* at 22a.

REASONS FOR DENYING THE WRIT

Petitioner, facing Commissioners' uncontroverted record on every element under this Court's precedents, advocates an unsupportably narrow view of this Court's disestablishment jurisprudence. Complaining that "[n]one of the statements [in the Act] even mentions disestablishment," Pet. 19, Petitioner contends that this Court has imposed "clear statement requirements that cannot be satisfied by extra-textual, second- and third- hand material." *Id.* at 13. But the Court has expressly rejected such a "plain statement" rule, *Hagen v. Utah*, 510 U.S. 399, 411-12 (1994), and has implicitly rejected any such requirement in recent and directly relevant guidance, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998): "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act, unequivocal evidence derived from

the surrounding circumstances may support the conclusion that a reservation has been diminished."

Mischaracterizing the decisions below, Petitioner disregards substantial textual expressions of intent to terminate the Reservation plainly reflected in the Act's express terms, legislative history, and the contemporaneous Enabling Act. Disregarding its own proposed interpretive rule, Petitioner relies on inherently ambiguous or merely geographic references in the Act and modern administrative and Congressional materials, and invokes current "Executive Branch" views, evidence that this Court and others have found to be unreliable indicators of the intent of an allotment era Congress. *Yankton Sioux*, 522 U.S. at 355 ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."); *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 162 (2nd Cir. 2003) ("*Oneida*"), *rev'd on other grounds, City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

The cases Petitioner cites from other Circuits apply the same precedents of this Court to materially different statutes and significantly different records; they reflect different outcomes, not different rules of law. On the undisputed record below, the Opinion is an unexceptional application of existing law. It does not conflict with the decisions of this Court or any other Circuit and does not present a substantial federal question.

I. THE OPINION BELOW CORRECTLY APPLIES THIS COURT'S PRECEDENT TO A UNIQUE AND COMPELLING RECORD.

The Petition recognizes only portions of this Court's three-part "fairly clean analytical structure" for analyzing disestablishment cases. *See Solem*, 465 U.S. at 470. The decisions below, however, adhered faithfully to the analysis *Solem* and this Court's other precedents prescribe, looking to the language of the Division Act, the contemporaneous understanding of the impact of the Act, including the negotiations leading to enactment and its legislative history, events immediately following the Act's passage, including subsequent treatment and jurisdictional understandings regarding the area. *Id.* at 470-71.

First, "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Id.* *Solem* cautions that courts cannot expect Congress to have used specific language "detail[ing] whether opened lands retained reservation status or were divested of all Indian interests." *Id.* at 468 ("Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."). Thus, "explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment." *Id.* at 471.

Second, *Solem* recognizes,

> When events surrounding passage of the [dispositive] Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of

> the legislative Reports presented to Congress—unequivocally reveal a widely-held contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged.

Id. Third, *Solem* also sanctions looking, "to a lesser extent," to "events that occurred after the passage of [the dispositive] Act to decipher Congress' intentions." *Id.* at 470-71. And, *Solem* "recognized that who actually moved into opened reservation lands is also relevant to deciding whether a [dispositive] Act diminished a reservation." *Id.* at 471.

The Petition advances an analysis that cannot be harmonized with *Solem*. This Court has rejected Petitioner's contentions that the Court requires specific language of disestablishment or termination and that it imposes a "plain statement" rule. In *Hagen*, the Court reiterated that it has "never required any particular form of words before finding diminishment." 510 U.S. at 411; *see also Yankton Sioux*, 522 U.S. at 344-45 (collecting authorities and recognizing the Supreme Court has "construe[d]" language that "indicates diminishment" from Acts that do not explicitly terminate, abolish, or disestablish). Consequently, "evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *Yankton Sioux*, 522 U.S. at 351. In case after case,

this Court construed differing statutory language and unique historical records to divine congressional intent, recognizing that a disestablishment analysis is necessarily fact-specific. *Solem*, 465 U.S. at 469 (the effect of an "Act depends on [its] language and the circumstances underlying its passage").

As the courts below determined, the Division Act's compelling indications of Congress' intent to disestablish and the substantial and uncontroverted record regarding each factor of the *Solem* test point unequivocally to the disestablishment of the Osage Reservation. This case does not call for the Court to revisit its repeatedly articulated guidance.

A. The Text of the Division Act Demonstrates Congressional Intent to Disestablish the Osage Reservation.

Petitioner ignores the district court's extensive statutory analysis and mischaracterizes the Court of Appeals' opinion as concluding the Act is "silent and unambiguous" as to continued reservation status. Pet. 8. Petitioner is wrong on this crucial point. Although the district court found the Act, correctly in the Commissioners' view, unambiguously intended disestablishment, Pet. App. 37a-42a, the Court of Appeals concluded "the operative language of the statute does not unambiguously suggest diminishment or disestablishment" and proceeded to address the standards applicable "if the statute is ambiguous." Pet. App 14a-22a. The Court of Appeals did not find "no ambiguity in statutory text." Pet. 10. The Act either unambiguously intends disestablishment or is, at a minimum, ambiguous on that intent, because the express terms of the Act convey substantial congressional intent to disestablish the Reservation.

The Petition is similarly mistaken in portraying the Division Act as merely a run-of-the-mill allotment act that did no more than issue allotments to tribal members. Pet. 17, 19. The statutory text reflects a far broader intent. At Osage members' request, the Act effected a remarkable and then-unprecedented divestiture of the Osage Tribe's[7] beneficial interest in nearly all tribal lands, accrued tribal funds, and future revenues, and transferred the beneficial interest in substantially all these assets to the individual members. Section Two of the Act (Pet. App. 59a-66a): (1) provided for the sale of buildings used by tribal government, including "the Chief's house"[8]; (2) transferred essentially all remaining lands of the Osage Tribe to 2,229 identified tribal members subject to terms contemplating that members would promptly sell the great majority of those lands to non-Indians; and (3) reserved the entire interest in the former tribal mineral estate, not as the Petition states, "for the benefit of the Osage Nation," Pet. 3, but for the exclusive benefit of only the 2,229 individual "headright" members, leaving the Tribe only a small allowance to manage the minerals. The Tribe was

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[7] The name "Osage Nation" was adopted in 1994 and refers to the current Plaintiff tribe; "Osage Tribe" refers to the historic Osage Tribe, the subject of the Osage Division Act.

[8] True to its name, the Act divided all former tribal lands among the members of the Tribe. Division Act, § 2 (Pet. App. 59a-66a). Out of nearly 1.5 million acres, the Act only reserved for the Tribe three tracts totaling 480 acres, "exclusively, for dwelling purposes," and boarding school, reservoir, and agent's residence areas totaling slightly over 110 acres, all subject to sale by the Tribe. *Id.* Ninth, Tenth (Pet. App. 63a-64a).

left with no other financial assets or revenue sources necessary to support a tribal government.[9]

Contrary to the Petition's assertions, these provisions do not reflect statutory "silence" as to disestablishment. Pet. 18. In historical context, the Act and the history of its negotiations demonstrate Congress' and the Tribe's intent to terminate reservation affairs. The Act's allocation of sale proceeds to individuals contrasts starkly with the March 22, 1906 Act this Court interpreted in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). In *Seymour*, the Court found support for continued reservation status in the relevant act's provisions for funds from sale of lands to be deposited in the United States Treasury "to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington." *Id.* at 355. Similarly, *Solem* reflects that the dispositive act's retaining revenues for the tribe supported Congress intended to retain reservation status. 465 U.S. at 473-74 (because proceeds of sale were to be retained for the Cheyenne River Tribe's credit, the Secretary was "simply being authorized to act as the Tribe's sales agent"). Here, the Division Act's transferring all such assets from the Tribe to individual headright owners reflects the understanding that the Tribe would not need those

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[9] The Act transferred from the Tribe to its headright owning members (1) all funds from the Tribe's sale of its Kansas lands; (2) all mineral royalties; (3) all funds from the sale of town lots and other properties; and (4) "all monies to be received from the sale of grazing lands." Act, § 4, First, Second (Pet. App. 67a-68a). *See McCurdy v. United States*, 246 U.S. 263, 265 (1918).

assets because the State and County would govern the former reservation.

Contrary to Petitioner's contention that the Act did not open the Reservation to non-Indians and "allotted the surface estate in trust exclusively for Osage members," Pet. 3, the Division Act provided for the immediate sale of some tribal lands and, by imposing taxation and authorizing sale of "surplus lands" upon issuance of a certificate of competency, set the stage for the inexorable sale of former reservation lands to non-Indians. Although providing for issuance to each member of one "homestead" allotment to remain restricted for twenty-five years, it gave each allottee three "surplus lands" allotments, representing over two-thirds of the former Reservation, which the allottee could dispose of "the same as any citizen of the United States" upon demonstrating competency. Division Act, § 2, Seventh (Pet. App. 62a). Reinforcing the intent that most tribal lands allotted would be alienated promptly to nonmembers, all "surplus lands" allotments were to be taxable upon the earlier of three years after passage of the Act or issuance of a certificate of competency.[10]

The contemplated taxation and sale of allotted surplus lands must be viewed through the then-contemporary understanding that sale would divest the lands of reservation and "Indian country" status. *Yankton Sioux*, 522 U.S. at 343 ("The notion that reservation status of Indian lands might not be

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[10] At Osage, the Act of April 18, 1912, ch. 83, 37 Stat. 86, expedited this process by providing that an Osage allottee's share of tribal accrued and annual revenues would be payable upon issuance of a certificate of competency. *See McCurdy*, 246 U.S. at 266.

coextensive with tribal ownership was unfamiliar at the turn of the century.").

The intent to disestablish is further reflected in the severe and historically unique limitations the Act imposed on Osage tribal government that focused on protecting property rights of headright owners. The Act prohibited the Osage from changing their membership or form of government without congressional consent and limited tribal membership and participation in tribal government to only those headright owners.[11] Division Act, § 9 (Pet. App. 70a). The Act prescribed a government, consistent with the statutorily limited revenue available to it, which functioned for nearly a century primarily to manage oil and gas proceeds and other assets for the headright-owning members. *See Osage Nation of Indians Judgment Funds: Hearings on S. 1456 and S. 3234, Before the S. Subcomm. on Indian Affairs*, 92nd. Cong. 14-15 (1972) (Report of Department of the Interior) ("1972 Senate Hearings Report") at 14-15 (Osage Tribal Council "primarily responsible for the management of the tribal mineral estate and other tribal assets" and "does not enact ordinances governing the conduct of [Osage] members").[12] These

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[11] Headright ownership, and hence tribal "membership," was a property right under the Act and original constitution. By 1972, over a third of headright owners, the only tribal "members" entitled to vote in tribal elections and share in tribal revenues, were, in fact, non-Indians or members of other tribes. 1972 Senate Hearings Report at 14-15; *Cohen's Handbook of Federal Indian Law* 313 (Nell Jessup Newton *et al.* eds., 2005) ("Most persons of Osage ancestry own no headrights.").

[12] This perception was revised when the Tenth Circuit later rejected certain members' contention that Osage government was limited to administering minerals. *See Logan v. Andrus*, 640 F.2d 269, 271 (1981). Not until 2006, after Congress

provisions are consistent with the record below: there was no evidence the Osage Tribe considered, prior to the period immediately preceding the filing of this suit, it retained a reservation.[13]

Against these remarkably restrictive statutory limitations, Petitioner relies on scattered references in the Act to the Osage "Reservation." Pet. 16. However, the reference to "reservation" in a statute may denote the tribe's former lands or status or may merely provide a "convenient geographical description." *Yankton Sioux*, 522 U.S. at 356. The Court of Appeals correctly concluded that any reference to the "reservation" is "indirect at best, and it does not [reflect an intent] to maintain exclusive tribal governance within the original reservation boundaries." *See Yankton Sioux*, 522 U.S. at 348.

The courts below correctly concluded that the manner in which the Act effected the "division" of all Osage lands and assets reflects an overarching intent to strip the Tribe of governmental assets, contemplated a severely limited tribal role inconsistent with governing a reservation, and, together with the contemporaneous Enabling Act, shifted governmental functions from the Osage Tribe to Osage County, Oklahoma. These textual indicia are consistent with, and compellingly support, a congressional intent to disestablish.

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recognized the Osage Nation could extend membership beyond headright owners, Pub. L. 108-431, 118 Stat. 2609 (2004), did the Nation adopt its present Constitution and seek to assert sovereignty over fee lands.

[13] Former Principal Chief Charles Tillman testified that, before filing this suit, the Osage Nation had never formally contended Osage County remained a reservation. *See* C.A. Supp. Add. 359-60.

B. The Enabling Act Reinforces the Intent to Disestablish.

Petitioner, though recognizing that the Enabling Act recast the Reservation as Osage County, Pet. 2, ignores the significance of the contemporaneous Enabling Act to the determination of intent. The required "examin[ation of] all the circumstances surrounding the opening of a reservation," *Hagen*, 510 U.S. at 412, requires consideration of the Enabling Act, passed two weeks before the Division Act. The Enabling Act set the stage for dismantling barriers between tribal members and state government that persisted in other states, reclassifying the Osage Reservation as Osage County and giving Osage members the right to vote on whether to establish State government. *See United States v. Bd. of Cnty. Comm'rs*, 193 F. 485, 491 (W.D. Okla. 1911), *aff'd*, 216 F. 883 (8th Cir. 1914), *app. dismissed*, 244 U.S. 663 (1917) (finding that the Enabling Act required the Oklahoma constitutional convention "to constitute the Osage reservation a single county . . . . These Indians were to obtain the advantages of state and local government which would redound to their welfare and advancement.").

At the request of the Osage, *see* C.A. Supp. App. 279, 303-04, the Enabling Act provided that the former reservation would become Osage County, Oklahoma, and supplanted, as to civil and criminal matters alike, tribal government with State and County government. Enabling Act, §§ 2, 21. The Osage request that they be placed in a single county following statehood reflected their recognition that State, not tribal, government would apply prospectively. Consistent with this request, the

Enabling Act replaced the formerly Indian character of government over the area with one emanating from state law, with a county seat, voting districts for state elections, and judges designated under non-tribal law. *Id.* As in *Yankton Sioux*, 522 U.S. at 352, the Osage would "assist in making the laws which will govern [tribal members] as citizens of the state and nation."

Dramatic differences between the Oklahoma-related provisions of the Enabling Act and those pertaining to New Mexico and Arizona in the same statute reinforce the Tenth Circuit's holding that the Division Act contemplated no Osage reservation would remain.[14] Unlike the Arizona and New Mexico provisions of the Enabling Act, the Oklahoma provisions made no distinction between tribal and non-tribal residents of the State, because in Oklahoma they were both to be taxable. *Compare* 34 Stat. 267, § 25, *with id.* § 3. While, in identical provisions of the 1906 Enabling Act, the three States disclaimed *title* to federal and Indian lands, the Arizona and New Mexico provisions, but not the Oklahoma provisions, contained a broad exception disclaiming *jurisdiction*, encompassing both federal public lands *and Indian lands*. *Compare id.* § 25, Second, (Arizona/New Mexico), *with id.* § 3, Third (Oklahoma) (only federal public lands). Similarly, the Enabling Act gave Oklahoma Indians the right to vote for or against statehood, and thus to influence whether they would assume rights and responsibilities similar to those of state citizens,

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[14] The New Mexico and Arizona portions of the Act, though enacted in the 1906 Act, did not become effective due to Arizona's rejection of joint statehood in 1906.

including taxation. *Id.* § 2; *see also Yankton Sioux*, 522 U.S. at 352.

The Osage Tribe's agreement that the Reservation would become Osage County in the new State and the Enabling Act's provisions subjecting Oklahoma Indians to Oklahoma law, *see* C.A. Supp. App. 306 & n.61, reinforce the textual indicia of intent in the Division Act. Whether historians and the district court are correct that "no reservations remain in Oklahoma," *see* Francis Paul Prucha, *The Great Father* 735-57 (1984) (cited Pet. App. 41a), is not presented in this case. However, the Enabling Act text reinforces the provisions of the Division Act reflecting that the 1906 Congress intended to terminate Osage reservation status. The statutes simply do not present the issue of "statutory silence" upon which Petitioner's arguments are premised.

C. The Circumstances Surrounding the Division Act's Passage Point to Disestablishment.

Petitioner disregards or distorts the Court of Appeals' detailed discussion of the historical background leading to the passage of the Act and the statements of Osage and congressional participants in the legislative process, as well as historians, recognizing that the Act would lead to "dissolution of the reserve." *See* Pet. App. 16a (quoting W. David Baird, *The Osage People* 68 (1972)). Rather than confronting the evidence below, Petitioner presents the Division Act in an historical and practical vacuum. As the Court of Appeals correctly concluded, however, based on uncontroverted evidence, "[t]he manner in which the [Act] was negotiated reflects clear congressional intent and Osage understanding that the reservation would be disestablished." Pet. App. 15a.

As the Tenth Circuit explained, the Division Act followed a history of increasing pressure on Indians in what is now Oklahoma for the relinquishment of tribal relations. *Id.* at 15a-18a. In 1894, pursuing its policy to encourage the abandonment of the reservations, the federal government sent a special Osage Commission to the Osage. C.A. App. 237. The record supports the Court of Appeals' finding that the Osage, although excepted from the Dawes Commission process, were acutely aware of the "familiar forces" affecting tribes in the allotment era, *see DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975), including non-Indians' pressure for tribal lands and passage of allotment era legislation, and that the Osage acted in response to those pressures. Pet. App. 15a. After the Court's decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the "Osage would have clearly understood that they could no longer resist the imposition of allotment on their reservation [and their] efforts were thereafter devoted to obtaining the best terms that they could negotiate." C.A. Supp. App. 296; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-88 (1977) ("By the time of the first of these Acts, in 1904, Congress was aware of the decision of this Court in [*Lone Wolf*], which held that Congress possessed the authority to abrogate unilaterally the provisions of an Indian treaty.").

As the Court of Appeals recognized, prior to the passage of the Division Act, "'[for several years, the Osage . . . ha[d] been considering the question of asking the Government to divide its lands and moneys among the members of the tribe.'" Pet. App. 15a (alterations in original) (quoting S. Rep. No. 59-4210, at 1 (1906)). By June, 1904, the Osage elected a Chief who favored allotment, and the Tribe drafted

and approved legislation to that effect in a subsequent general election. C.A. App. 238. In 1905, Congress passed the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, creating the Osage Townsite Commission and opening lands to non-Indian settlement by authorizing the sale of townsites within the Reservation. C.A. Supp. Add. 011.

In 1905, an Osage delegation appeared before Congress to negotiate a bill "to abolish their tribal affairs and to get their lands and money fairly divided, among themselves, so that every individual will be there to give his views in the matter, and the majority agree upon a plan." C.A. Add. 009. Members of the Tribe were "very anxious to bring about the allotment at the earliest possible time," but sought to have the lands "held together until such time as the allotment can be made and then leave the new State of Oklahoma to do what in its wisdom seems fit in respect of the division of this territory into different counties." C.A. Supp. Add. 51. As the Court of Appeals found, Osage representatives recognized "that the allotment process would terminate reservation status." Pet. App. 16a (citing Black Dog).

The record supports the Court of Appeals' finding that "[t]he Osage themselves presented an allotment act to Congress in February 1906, and by June of that year, Congress passed the Osage Allotment Act." *Id.* at 16a. The legislative history reflects Congress' insistence on provisions to authorize certificates of competency and impose

taxation on surplus lands that would expedite the sale of surplus lands. *See id.* at 17a.[15]

Petitioner argues the insufficiency of each of these statements standing alone, but declines to address cumulatively the intent reflected in the course of negotiation and advances no countervailing evidence.[16] The record amply supports the Court of Appeals' conclusion that the "manner in which the [Division Act] transaction was negotiated," *Solem*, 465 U.S. at 471, reflects that "all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act." Pet. App. 17a.

D. Events Occurring After Passage of the Act Confirm Congress' Intent.

The Court has instructed that "events that occurred after the passage of a surplus land Act" are relevant to "decipher Congress' intentions." *Solem*, 465 U.S. at 471. Although the Court has called this factor "unorthodox and potentially unreliable," it also

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[15] *See* C.A. Supp. Add. 49 (1906 Letter of C.F. Larrabee, Acting Comm'r, Office of Indian Affairs) ("It is believed that the Osage Indians should be required to pay taxes on their surplus lands the same as citizens of Oklahoma Territory. There occurs to me no valid reason why the Indians should not be required to bear their share of the burden of State and county maintenance through taxation on their surplus lands.").

[16] Similarly, Justice Marshall's dissent in *Rosebud*, 430 U.S. at 626 (Marshall, J., dissenting), in which the majority held the Rosebud Sioux Reservation diminished, argued the "legislative history of the Rosebud Acts is extraordinarily sparse." However, the record here contains the statements of tribal representatives and members of Congress pointing towards disestablishment and "the record [of the negotiations] contains no discussion of the preservation of the [reservation] boundaries." *Yankton Sioux*, 522 U.S. at 347.

recognizes that, "in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue . . . the technique is a necessary expedient," *id.* at 472 n.13 (citation omitted), and that "[w]hen an area is predominately populated by non-Indians with only a few remaining pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Id.* at 471 n.12.

Factors indicating disestablishment include a dramatic decrease in tribal member settlement and an increase in non-Indian settlement immediately following the passage of the relevant Acts, *see Yankton Sioux*, 522 U.S. at 356, key participants' and officials' recognition that the reservation was terminated, *Solem*, 465 U.S. at 471, and settled jurisdictional expectations pertaining to the affected area. *Rosebud*, 430 U.S. at 604-05 ("[L]ongstanding assumption of jurisdiction by the State over an area that is over 90 % non-Indian both in population and in land use" weighs in favor of a finding of diminishment); *Yankton Sioux*, 522 U.S. at 357 ("The State's assumption of jurisdiction over the territory, almost immediately after the 1894 Act and continuing virtually unchallenged to the present day, further reinforces our holding."). The record below contains compelling and uncontroverted evidence on each of these factors.

The Petition repeatedly mischaracterizes the Commissioners' demographic evidence as "modern." Pet. 5, 11. Nothing could be further from the truth. As the Court of Appeals recognized, Pet. App. 21a, the uncontroverted record established that, in just three years, from 1907 to 1910, the total Osage

County population grew by a third; then it grew by 82% from 1910 to 1920, and by another 30% from 1920 to 1930, roughly tripling the 1907 total population. C.A. App. 307-08. Significantly, by 1910, of the total County population of 20,101, only 1,345 persons identified themselves as Osage members and, by 1920, the total Indian population in Osage County was 1,208 out of a total of 36,536. *Id.* That demographic pattern continues. *Id.* at 309.

The uncontested facts further established that, pursuant to the Division Act and the subsequent Act of March 3, 1909, ch. 256, 35 Stat. 778, further authorizing the Secretary of the Interior to sell the "surplus lands" of the Osage, land ownership dramatically shifted from the Tribe and its members to non-members. As the Court of Appeals found, Pet. App. 22a, by 1957, the surface rights to 1.1 million of the 1,464,838.5 acres that were allotted under the 1906 Act had been alienated from trust or restricted status and, by 1972, only 231,070.59 acres held by 436 individuals, representing approximately one-sixth of the former Reservation area, remained in restricted ownership.[17]

The undisputed facts below also show that, in the period immediately following the 1906 Acts, Interior Department officials recognized repeatedly that the Reservation was disestablished and that jurisdiction had shifted as a result. As the Court of

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[17] Osage County land records now reflect only 109 acres held by the United States in trust for the Osage Nation and 518.14 acres of land described in those records as "Indian Village Lands" "set aside for the use and benefit of the Osage Indians." C.A. App. 291-92. These lands amount to roughly 0.04% of the total lands in Osage County. *Id.*

Appeals found, Pet. App. 20a-21a, the Osage Agency Superintendent acknowledged the jurisdiction of the State and County over Osage County, a recognition that was inconsistent with continued reservation status. In his 1916 annual report to the Secretary of the Interior, he states his "office has experienced no difficulty in maintaining order upon the reservation. This duty, of course, falls to the County and State officials." His 1919 Annual Report states that "Osage County is organized and the duties of maintaining order devolves on the County and State officials." The 1920 Annual Report refers to towns in "Osage County, formerly the Osage Indian Reservation." *See* Pet. App. 20a (citing record references). These reports by the official with immediate responsibility for the Osage stand uncontroverted in the summary judgment record regarding contemporaneous agency understandings; they are not merely casual references, as Petitioner suggests, to a "former reservation," but first-hand accounts that, following 1906, state and federal officials treated the area as a County, not as a reservation.[18] They unqualifiedly support the conclusions below that knowledgeable participants understood that the Reservation had been disestablished. They reflect that, immediately

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[18] The Petition takes liberties with the record on this point. The Superintendent is not a "regional" official, *see* Pet. 22, but the official directly supervising the delivery of federal services to a tribe. Petitioner's contention that references to a "former" reservation are by a "single" lower level BIA official misstates the record. *See* C.A. Supp. App. 316 n.70 (quoting April 21, 1908 Letter from the Acting Commissioner of Indian Affairs to the Indian Agent for Osage Agency concerning an "inquiry from one of the Township trustees of Osage County, formerly the Osage Indian Reservation, but now a part of the State of Oklahoma.").

following 1906, State and County jurisdictional authority displaced federal and tribal, patterns that continued to the time of the district court's opinion. C.A. App. 339-42 (Wayman Depo.); *id.* at 344-50 (Wilson Depo.); *id.* at 334-36 (Koch Depo.); *id.* at 360-61 (Tillman Depo.).

Congress also enacted legislation premised on the understanding the Reservation had been disestablished. Section 17 of the 1917 Indian Appropriations Act, ch. 146, 39 Stat. 969, 983, provided, "[a]ll of Osage County, Oklahoma, shall hereafter be deemed to be Indian country within the meaning of the Acts of Congress making it unlawful to introduce intoxicating liquors into Indian country." C.A. Supp. Add. 72. As this Court recognized regarding similar provisions of the 1910 Act subjecting the opened lands at issue in *Rosebud* to federal laws prohibiting the introduction of alcohol, *see Rosebud*, 430 U.S. at 613, the 1917 Act plainly reflects the understanding that, but for the new statute, Osage County was not Indian country and would only have that status pertaining to alcohol "hereafter." Long before 1917, Congress had already imposed federal prohibitions on introduction of alcohol into "Indian country." *Id.* Since the Court assumes "Congress is aware of existing law when it passes legislation," *Yankton Sioux*, 522 U.S. at 351, passage of the 1917 Act can only have been premised on the understanding that the Osage Reservation had been disestablished.

Compellingly, when Congress in 1936 enacted the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 503-509, allowing Oklahoma tribes to incorporate under the sovereignty-protecting provisions of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461-

478, it expressly excluded Osage, leaving it perhaps the only Native American tribe then statutorily precluded from electing IRA powers. *See* 25 U.S.C. § 508.

Given that Petitioner advanced no evidence that contemporaries of the 1906 Act considered the reservation to remain intact, the Court of Appeals correctly considered this evidence probative.

E. Opinions of Historians Support the Tenth Circuit's Conclusion.

Petitioner criticizes consideration of the opinions of leading historians that its own expert testified were authoritative and accurate. Pet. 20-21. Contrary to Petitioner's unsupported disparagement, the evidence of historians' views the Commissioners presented below was not "post hoc academic conjecture." Pet. 20. It was introduced pursuant to expert testimony that was affirmed by a sound district court order that Petitioner did not challenge on appeal. C.A. Supp. App. 1-65.

The Tenth Circuit correctly considered the undisputed historical evidence submitted by Professor Kelly, Pet. App. 17a-18a, who this Court has cited. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 181 n.12 (1989). Professor Kelly collected and reviewed historical evidence from the National Archives and other sources contemporaneous to the 1906 Act, C.A. App. 241, 242-43, and related the consensus of historians who have studied the Osage, the Division Act, and its effects. *Id.* at 244. He identified as authoritative preeminent historian Francis Paul Prucha, whom this Court has cited repeatedly as authoritative, *see, e.g., Hagen*, 510 U.S. at 426 n.5, and other leading

historians on federal Indian policy, Oklahoma, and the Osage. The courts below did not err in considering the uncontroverted views of those authorities that the Osage reservation was "dissolved."[19] *See* Pet. App. 17a-18a (citing Kelly Aff. referencing authoritative works of Terry P. Wilson, *The Underground Reservation: Osage Oil* (1985); Berlin B. Chapman, *"Dissolution of the Osage Reservation," Chronicles of Oklahoma* (1942); Baird, *supra*, and Prucha, *supra*). Professor Kelly testified that their research and conclusions support his conclusion that, following 1906, the Osage Reservation "was dissolved and replaced by Osage County." C.A. Supp. App. 42.

Significantly, Petitioner's only arguably historical witness, ethno-anthropologist Garrick Bailey, Ph.D., testified that Professor Kelly is a "very good historian," C.A. Supp. App. 329, that Kelly accurately "reported what the historical record" said, *id.* at 331, and that Bailey had not formed a contrary opinion on whether "Osage County today is or is not a reservation," *id.* at 332. The Court of Appeals did not err in finding this evidence probative.

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[19] Far from disallowing historians' opinions, this Court itself has considered historians' reports in disestablishment cases. *See Solem*, 465 U.S. at 466 n.5 (report of F. Hoxie on Cheyenne River Act of May 29, 1908 "incorporated into the record"), & nn.21, 23, 24 & 25 (referencing Hoxie); *Yankton Sioux*, 522 U.S. at 346 (citing testimony of tribe's historian). The Circuits the Petition portrays, Pet. 8-11, as in conflict with the Tenth Circuit's Opinion have done so as well. *See, e.g., Oneida Indian Nation v. New York*, 860 F.2d 1145, 1149 (2d Cir. 1988); *United States v. Webb*, 219 F.3d 1127, 1137 (9th Cir. 2000).

F. Petitioner's Evidence of Recent and Ambiguous References to an "Osage Reservation" Is Not Probative.

Having submitted no evidence below regarding the period soon following 1906, Petitioner now advances isolated, unsupported federal statements that are more "contemporaneous" with the current litigation than with the dispositive 1906 enactments at issue. Pet. 23-26. The courts below correctly concluded this evidence did not contravene the evidence of the 1906 intentions of Congress. Pet. App. 18a-19a. Petitioner's evidence is entitled to little or no weight under *Solem*'s criterion, "events that occurred after passage" of the dispositive act. 465 U.S. at 471.

The Petition cites no authority supporting the assertions in its Questions Presented that the Second, Eighth and Ninth Circuits have ruled that recent "expert views of the Executive Branch," with other material, may "override" other evidence, or for the novel proposition that the courts below erred in not "obtaining" the views of the Executive Branch. Pet. Question Presented I & II. The cases the Petition cites, in fact, directly contradict these positions. The lead-off case Petitioner advances to portray a split in the Circuits, *Oneida*, 337 F.3d 139, 162, agrees with the Tenth Circuit on this point, as on others, *see* Point II *infra*, rejecting as unprobative of dispositive intent legislative and administrative documents issued at the earliest a half-century after the relevant events. The recent statements of contemporary regulators using the words "Osage Reservation" in the contexts Petitioner advances should be viewed as convenient geographical references, unfounded and uninformed speculation,

or the fruits of contemporary tribal efforts to expand jurisdiction previously abandoned or bypass gaming law requirements.

References to a "reservation" and maps showing an Osage "reservation," Pet. 25, are ambiguous at best given the specific reservation of the minerals underlying the County for the benefit of tribal members. *See* Wilson, *supra*. However, if a reference to "reservation" indicates the reserved minerals, a mineral "reservation" would not be material here. *See* C.A. 175 ("This reservation of mineral rights led to the BLM including an Osage Reservation on a map of the United States."). As the district court observed, Pet. App. 35a (quoting *Cohen's Handbook of Federal Indian Law* 34 (1982 ed.), a "reservation" must be "lands set aside under federal protection for the residence of tribal Indians."

Nor is it probative that the Acting General Counsel of the National Indian Gaming Commission opined, based on "limited documentation" Petitioner provided, that certain Osage lands lie within a "reservation" or that the agency authorized gaming based on the opinion. Pet. 23 (citing July 28, 2005 Letter, Penny J. Coleman National Indian Gaming Commission, to Richard Meyers, Department of Interior). The opinion does not apply this Court's disestablishment test; rather, it merely catalogues materials Petitioner submitted and concludes that "gaming on the two parcels is authorized." *Id.*

Other cited references do not support continued reservation status. The 1935 Opinion of the Solicitor, Pet. 28, concerned "crimes and misdemeanors" committed by or against Indians within the "Indian villages," the 480 acres of land retained by the Tribe in the Division Act, not the fee

lands at issue here. However, the Opinion expressed "no objection . . . to the continued exercise of State jurisdiction in accordance with the practice of some years' standing." The 1994 letter of a Regional Solicitor, Pet. 23, contains no analysis beyond stating the Reservation was created in 1872. C.A. 194-95. The 2006 Stipulation of Fact in litigation Osage filed against the United States, Pet. 26, did not concern reservation status; it concerned royalty accounting on Osage minerals, of course, separately "reserved." The Petition grossly mischaracterizes, Pet. 24, the effect of the Assistant Secretary–Indian Affairs' January 19, 2005 publication of a notice in the Federal Register, "Osage Tribe Liquor Control Ordinance." The publication was purely a ministerial act certifying the Nation's adoption of such an ordinance as required by 18 U.S.C. § 1161 and reflects no federal determination concerning the Osage Nation's reservation status. *See* 70 Fed. Reg. 3054 (Jan. 19, 2005).

None of these documents, tendered without evidentiary foundation, contain probative content concerning the intent of the 1906 Congress which might override views of officials contemporaneous to the Division Act and the Enabling Act.

The only authority the Petition cites for the novel proposition that a court must consider, much less "obtain," the current position of the United States references a position far from current to the disestablishment litigation, Pet. 22 (citing *Hagen*, 510 U.S. at 417-18). *Hagen* did not rely on current executive views, but instead referenced 1903 and 1905 executive actions contemporaneous with the dispositive act. *Id.* at 417-20. But here, the Commissioners' uncontroverted evidence showed the

Executive Branch during the period soon following 1906 unequivocally considered the reservation terminated. Given that evidence, this Court should reject the Petition's invitation to create a disestablishment jurisprudence that would give weight to fruits of recent legislative and administrative efforts by any side. The Petition's list of recent "reservation" references carries little if any weight.

The courts below correctly relied on the language of the Division Act, negotiating and legislative histories, and evidence contemporaneous to and immediately following the 1906 Act, all supporting the widespread understanding that Congress intended the Act to disestablish the Osage Reservation. That conclusion presents no issue warranting this Court's discretionary review.

II. THE OPINION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioner fails to demonstrate the existence of a split in the Circuits. Rather, under *Solem*'s "fairly clean analytical structure," different statutory texts, surrounding circumstances, and subsequent histories led to the different results in the one-case-per-Circuit examples the Petition deploys.[20] *See Solem*, 465 U.S.

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[20] Petitioner bases its argument that a conflict within the circuits exists on the faulty premise that an analysis of the "same statutory text" by one court must lead to an identical outcome in another court. Pet. 12 ("The law in the area now varies so substantially by geography that analysis of the same statutory text would produce polar opposite outcomes depending on the circuit in which the case arises or the land happens to lie."). This argument is legally and factually unsupportable. *See Minnesota v. Mille Lacs Band of Chippewa*

at 467 ("Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise.").

The Second Circuit in *Oneida*, 337 F.3d 139 (2nd Cir. 2003), did not adopt the narrow approach Petitioner urges. The *Oneida* court recognized that language of cession "is not a prerequisite for a finding of diminishment. Rather an act's legislative history and the subsequent treatment of the land (including settlement patterns), may also suffice." *Id.* at 159. The Second Circuit clarified that "when these elements, considered in their totality, fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did take place." *Id.* at 160.

The *Oneida* court rejected the argument that legislative and administrative documents and subsequent treatment of the reservation demonstrated that the reservation had been disestablished, not because they were legally immaterial but because they were factually insufficient because remote in time from the dispositive actions. *Id.* at 162-64. There is no material distinction between the legal standards the Second Circuit applied in *Oneida* and those the Tenth Circuit applied here.

Indians, 526 U.S. 172, 202 (1999) ("The . . . argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction.").

Similarly, in *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), the Ninth Circuit did not mechanically conclude that the absence of explicit language disestablishing the reservation rendered any further analysis unnecessary. Instead, after recognizing that the language of the General Allotment Act did not evidence Congress' intent to disestablish the Nez Perce Reservation, the court found the text of the relevant act, including a savings clause added at the Nez Perce's insistence, and the circumstances leading to and following passage of the dispositive 1893 Agreement, reflected that federal officials, the Nez Perce, Congress, and State officials all considered the Reservation to remain. *Id.* at 1135-37. *Webb* did not reject evidence of contemporaneous understanding because it was legally immaterial. *Id.* at 1137 n.15. Nor did the court refuse to consider historical testimony. Rather, "[t]he historical information independently confirm[ed] that there was no intent to diminish or disestablish the Nez Perce Reservation." *Id.* at 1138. The decision below does not conflict with *Webb*.

The Eighth Circuit's decision in *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th 2010) ("*Podhradsky*"), does not even address the issue Petitioner posits, much less reflect a circuit division. The cited pages of the Eighth Circuit's decision, 606 F.3d at 1008-10, address disestablishment in light of this Court's *Yankton Sioux* decision and the Eighth Circuit's earlier decision in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999) ("*Gaffey II*"). There is no indication in *Podhradsky*, or the district court decision it reviewed, *Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040, 1045-46, 1052-53 (D.S.D. 2007), that either court declined to consider or discounted the significance of the kinds of

evidence the Petition disparages here—or that any party advanced such evidence. However, the Eighth Circuit looked beyond the statutory text and placed weight, on the "historical record" of negotiations, just as the Court of Appeals did below. Pet. App.14a-18a.[21]

That the Tenth and Eighth Circuits are in concert is plainer still when *Podhradsky* is viewed against its predecessor decisions, *Yankton Sioux*, in which this Court extensively considered the 1894 Act, its language, legislative history, contemporaneous events surrounding passage, and subsequent treatment of the area, and *Gaffey II*. In *Gaffey II*, the Eighth Circuit recognized that "[e]ach act must be analyzed individually, its effect depending on the language used and the circumstances of its passage." *Gaffey II*, 188 F.3d at 1022. *Gaffey II* expressly accords subsequent events weight consistent with the decision below: "Although evidence regarding the subsequent treatment of the area cannot control when there is strong textual and contemporaneous evidence regarding the status of the land in question, courts have consistently recognized that events occurring after the passage of [an act] may shed light on the contemporaneous understanding of the act"; and, "[e]stablished jurisdictional patterns may also over time lead to the development of justifiable expectations which the Supreme Court has found worthy of consideration."

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[21] Petitioner's reliance on *Yellowbear v. Wyoming*, 174 P.3d 1270 (Wyo. 2008), as further evidence of a conflict is misplaced. Indeed, in that case, after finding hallmark language of disestablishment, *id.* at 1282, the court nevertheless looked to circumstances surrounding passage of the act and subsequent treatment of the area. *Id.* at 1282-84.

Id. at 1028. *Gaffey II* agreed also with the decision below in finding "limited interpretation value" in evidence of "Yankton Sioux Reservation" in later administrative documents and maps. *Id.* at 1029 n.11. The Eighth Circuit's jurisprudence does not conflict with the decision below.[22]

Any differences between the decision below and the holdings of other Circuits are based on the differences in the records before the courts and do not warrant this Court's review.

III. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Petitioner and *Amicus* falsely portray the decision below as injecting uncertainty regarding civil or criminal jurisdiction.[23] This Court rightly rejected similar fears in *Rosebud*: "To the extent that [tribal] members . . . are living on [non-reservation] allotted land . . ., they, too, are on 'Indian country,' within the definition of 18 U.S.C. § 1151, and hence subject to federal provisions and protections." 430 U.S. at 615 n. 48.

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[22] Given that there is no conflict between the Opinion and the decisions of the Second, Eighth, and Ninth Circuits, the Seventh Circuit decision in *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009), is not material here. However, the Seventh Circuit analyzed both clear statutory text and compelling surrounding circumstances in its diminishment analysis. *See id.* at 665 (Ripple, J., concurring).

[23] The Petition also seeks to invoke this Court's discretionary review by referring to this Court's recent grant of *certiorari* in *Madison County v. Oneida Indian Nation*, No. 10-72, 79 USLW 3062 (U.S. Oct. 12, 2010). *See* Pet. 29. This Court, however, recently remanded the case to the Second Circuit Court of Appeals, No. 10-72, 562 U.S. ___, ___ S. Ct.___ (Jan. 10, 2011), and thus, *Madison* no longer "confirms the importance of the [disestablishment] question." Pet. 29.

Any jurisdictional confusion regarding whether a tribe, state or federal government has criminal and civil authority arises, not by the decision below, but because allotment-era Congresses enacted certain allotment-era acts that disestablished or diminished reservations and others that did not. *See Solem*, 465 U.S. at 468 ("[I]t is settled law that some surplus lands Acts diminished reservations, and other surplus lands Acts did not." (Citations omitted.)). Striving to discern congressional intent in each of its disestablishment and diminishment cases, this Court has crafted an analytical framework that pragmatically addresses *Amicus*' concerns by providing a fact-specific analysis to discern Congress' intent while honoring the context in which the allotment era Congresses acted and according weight to longstanding jurisdictional expectations. The Tenth Circuit's straightforward application of that standard does not create issues capable of recurrence.

The Tenth Circuit's finding of congressional intent to disestablish the Reservation reaffirms longstanding understandings and expectations that the State and County would exercise authority over the former reservation, understanding which are reflected in on-the-ground law enforcement today. *See Rosebud*, 430 U.S. at 603-04 ("Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of this authority is a factor entitled to weight as part of the 'jurisdictional history.'").

The Tenth Circuit's decision does not inject uncertainty into Indian country jurisdiction. Rather, the narrow analysis Petitioner and *Amicus* advocate, prohibiting consideration of longstanding jurisdictional history if the statutory text does not satisfy their proposed elevated interpretive standard, truly would threaten to destabilize civil and criminal jurisdiction. Their test would optimize the ability of a civil litigant, government, or criminal defendant, advancing a newly-minted statutory interpretation, to overturn longstanding jurisdictional expectations, even those shown by unequivocal evidence of contemporary understandings and subsequent demographic and jurisdictional history, like those presented here. Petitioner and *Amicus* disregard that, "[w]hen a party belatedly asserts a right to present and future sovereignty over territory, longstanding observances and settled expectations are prime considerations." *City of Sherrill*, 544 U.S. at 218 (footnote omitted). Upsetting such settled expectations, in fact, is precisely Petitioner's objective here. This is not the proper case in which to address *Amicus*' concern.

CONCLUSION

For the foregoing reasons, the Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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